FILED

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No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

_____

Stanley R. Tsuji, Pro Se–PETITIONER
(Your Name)

VS.

State Of Hawaii, et al.–RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS-FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Stanley R. Tsuji
(Your Name)

P.O. Box 778
(Address)

Honolulu, Hawaii 96808
(City, State, Zip Code)

(808) 537-4688
(Phone Number)

57pp

QUESTION(S) PRESENTED

1. The main issue that the United States Court of Appeals-For the Ninth Circuit (9th Cir.) failed to recognize was the deliberate, blatant & horrendous damaging of peoples health by the Respondents Beryl Iramina, Glen Hisashima, George Iranon, et al., running into the thousands and increasing by the minute being this is a housing facility and workplace. And their fiduciary duty to be that protection as a judiciary body. Complaint Exhibit (3), Division of Occupational Safety & Health, State of Hawaii Report (6-1-89).

2. The 9th Cir. did a reckless and incomplete review of this case-footnote [1] Appendix A-[1] "We decline to consider the remainder of Tsuji's contentions because they are raised for the first time on appeal."

3. The 9th Cir. failed to recognize the Petitioner's Stanley Tsuji's qualification under the Protected Class under Breathing under the Americans with Disabilities Act. I was under doctors care and did not just place myself on sick leave. Complaint Exhibits (2, 5-6), Dr. Craig Kadooka, M.D. (6-5-89), Dr. Edward K. Lau, M.D. (5-26-92) & Dr. Leigh Sakamaki, M.D.'s medical certificates (5-27-92). (Irreversible & Life-threatening Lung Damage).

4. The 9th Cir. failed to recognize the conspiracy by Respondents inflicted onto the Petitioner covered under 42 U.S.C. 1985(3) in the form of threats, Discrimination, unfair labor practices, violation of my doctors order 3, etc. Complaint Exhibits and Plaintiff Exhibit Addendum (10-12, 14). Seniority violations, threats, slander. Using inmates as human weapons. This case also falling under the classification of Disability Discrimination.

5. The 9th Cir. erred in not reversing the lower courts ruling denying reinstatement under 29 U.S.C. 660(c), in light that the Petitioner Tsuji had given the Respondents many notices and was & is still presently under doctors care for this case, being excused from the closed air environment. Complaint Exhibits (2,

5-6), Dr. Craig Kadooka, M.D. (6-5-89), Dr. Edward K. Lau, M.D. (5-26-92) & Dr. Leigh Sakamaki, M.D.'s (5-27-92) medical certificates.

6. The 9th Cir. may have violated the Petitioner Tsuji's 14th Amendment rights, a formal request was made with a U.S. congressional representative from Hawaii to invoke the 14th Amendment as it may apply to this case, the Petitioner Tsuji will keep this court apprised of the latest developments. Colgate v. Harvey, 296 U.S.-404, 56 S.Ct. 252, 80 L.Ed. 299 (1935).

7. The 9th Cir. failed to recognize the Respondents blatant & continued violation of the Federal Consent Decree in the operation of a safe correctional facility in terms of health concerns. Complaint Exhibit (3), Division of Occupational Safety & Health, State of Hawaii Report (6-1-89).

8. Operating an unsafe correctional facility is also in violation of the following federal and state health & safety laws 29 C.F.R. 1903.13, 1910.94(vi), H.R.S. 396-6.

9. The 9th Cir. failed to recognize this case as a Class-Action.

10. The 9th Cir. failed to recognize the Respondents violation of Federal and State Whistleblowers' Protection Statutes 42 U.S.C. 1985(3), 29 U.S.C. 660(c), 29 C.F.R. 1630.4, 1630.12(a), (b), H.R.S. 378-62.

11. The 9th Cir. failed to apply the doctrine of Res Ipsa-Locquitur to this case.

12. The 9th Cir. allowed the Respondents to Violate a Clear Mandate of Public Policy in further victimizing the Petitioner, Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982).

13. The 9th Cir. failed to recognize the Respondents violation of collective bargaining agreements with the Petitioners union representative, the United Public Workers-Unit 10 under

Seniority, Vacation Leave, Sick Leave. Plaintiff Exhibit Addendum (25).

14. A memo from Beryl Iramina to Wayne Tanaka dated April 19, 1993 Complaint Exhibit (20), clearly illustrates Ms. Iramina's fear and avoidance of not having an air-quality re-test of the Punahele complex as recommended by Dr. Sakamaki, Complaint Exhibit (6) – this being 11 months after her work order Complaint Exhibit (1) and 1 day before the Labor board hearing on April 20, 1993 Appendix E and in reference to Complaint Exhibit (3) air-quality tests conducted at the Punahele complex on 6-1-89.

Also Beryl Iramina never submitted any work order or documentation to ascertain that work was done to the vents and the replacement of the air chiller at the Punahele complex as she claims. Complain Exhibit (1).

I was on duty up until 5-21-92, when this alleged vent work was supposedly completed, there were never any old or new vents and replaced air chiller in the vicinity or any signs of construction work being done to the Punahele complex at that time. Complaint Exhibit (1).

15. Beryl Iramina in Complaint Exhibit (1) also failed to address the fungal growth problem and circulating airborne fungal spores as stated in Complaint Exhibit (3) growing in the vents.

It is scientifically recognized that the only way to control fungal growth in a closed air ventilation system is to install a chlorine filter that disinfects the re-circulated moisture. No chlorine filter was ever installed in the Punahele complex.

16. The Statutes of Limitation will not begin until the Respondents can prove that the Punahele complex is made safe for human habitation as addressed in the air quality tests on 6-1-89 Complaint Exhibit (3) for all related issues presented by the Petitioner. Inmate housing & work safety being the main issue.

17. I did not just place myself on sick leave as the Respondents and their representatives contend. I sought and received 3 medical recommendations excusing me from work due to the unsafe air-quality problem and previous life-threatening

lung damage. Complaint Exhibits (2-3, 5, 6) & Appendices E and F.

18. A person's health is the most important thing in their life. I should not be forced or manipulated to compromise my health as I have been horrendously forced in this case.

It is time to bring light to this malicious cover-up. The health and welfare of many people's lives is counting on justice to prevail, besides my own.

The bottom line is supposed to be work safety as the main priority.

The Respondents and their representatives, separately & collectively have made a blatant and malicious mockery out of enacted federal and state work safety standards for civil service employment.

To be forced to suffer further life threatening lung damage is absurd & ludicrous, on top of all the horrific atrocities that the Respondents and their representatives have inflicted against my family and myself all of these 10 extremely arduous, unconscionably tormented years. Something not even a convicted criminal has to go through.

It's not fair or just that I be crucified in this horrendous manner for the Respondents blatant and inexcusable negligence & incompetence.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners-All persons adversely affected from exposure to the carcinogens in the closed air environment at the Hawaii Community Correctional Center-Punahele Complex-60 Punahele Street, Hilo, Hawaii 96720.

Respondents-Beryl Iramina, Glen Hisashima, George Iranon, Department of Public Safety, et al.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 26, 1998.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A-____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix ____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including

_____ (date) on _____ (date) in Application No. A-____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, subsection 1, para. 4, Citizens or entities protected

Americans with Disabilities Act

42 U.S.C. 1985(3) Depriving persons of rights

29 U.S.C. 660(c) Discharge or discrimination

29 C.F.R. 1903.13 Imminent Danger

29 C.F.R. 1910.94(vi) Clean air

29 C.F.R. 1630.4 (b), (e), (i) Discrimination Prohibited

29 C.F.R. 1630.9 Not making reasonable accommodations

29 C.F.R. 1630.12 (a), (b) Retaliation and Coercion

Hawaii Revised Statutes

H.R.S. 386-25 Vocational Rehabilitation

H.R.S. 378-62 Whistleblowers' Protection Act

H.R.S. 396-6 Employers responsibility, safe place

H.R.S. 386-31 (b) Temporary Total Disability

STATEMENT OF THE CASE

This has been 6 years and 8 months of the most arduous, and excruciating time of my life defending this case. The health and welfare of peoples lives is suppose to be the most important concern. I dedicated 7 1/2 years of my life as an Adult Corrections Officer and I'm still fighting for the safety of the public in my unofficial role. I have no reprimand in my Adult Corrections Officer file, only perhaps a Wrongful Termination charge while I was under doctors care. I ask this court to help me correct these wrongs by the Respondents.

REASONS FOR GRANTING THE PETITION

The overwhelming reason to grant this Writ of Certiorari is the Respondents blatant, horrendous and shameful conduct in permitting so much harm to so many people. The Respondents exemplify the greatest level of evil, for such an extended period. To deny the Petitioner a Writ of Certiorari would be equal to awarding Adolf Hitler the Nobel Prize for exterminating Jewish people.

I was one of four people medically excused from this closed air environment, they include Larry Enriquez, Richard De Aguiar, James K. La'a and myself, along with the thousands more unaware or intimidated and unable to respond. And also Bruce Sakamoto, Inmate Educational Counselor.

Wherefore, the Petitioner Tsuji requests with this court to reverse the decision of the 9th Cir. and place an order or remand this case, so that the closed air environment be mandated to comply and be made safe, the Petitioner be reinstated under 29 U.S.C. 660(c); be placed with Vocational Rehabilitation under H.R.S. 386-25; reinstate my benefits under H.R.S. 386-31 (b); and hold my perpetrators for damages in their individual capacities. Blaylock v. Schwinden, 862-F.2d 1352 (9th Cir. 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Stanley R. Tsuji

STANLEY R. TSUJI, Pro Se

Date:

January 23, 1999

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STANLEY R. TSUJI,	)	No. 97-17152
	)	
Plaintiff-Appellant,	)	D.C. No. CV-96-01069 (SPK)
	)	
v.	)	
	)	
STATE OF HAWAII,	)	
DEPARTMENT	)	MEMORANDUM*
OF PUBLIC SAFETY,	)	
	)	FILED
Defendants-Appellees,	)	OCT 26 1998
	)	CATHY A.
and	)	CATTERSON,
JOHN DOES 1-100;	)	CLERK, U.S. CRT. OF
JANE DOES 1-100	)	APP.
	)	
Defendants.	)	
	)	

Appeal from the United States District Court
for the District of Hawaii (Honolulu)
Samuel P. King, Senior District Judge, Presiding

Submitted October 20, 1998**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4

Before: T.G. NELSON, KLEINFELD, and HAWKINS, Circuit Judges.

Stanley R. Tsuji appeals the district court's grant of summary judgment to defendants in his action alleging violation of his civil rights on the basis of disability and conspiracy arising under 42 U.S.C. subsections 1983, 12112, and 12132. We have jurisdiction pursuant to 28 U.S.C. subsection 1291. We review de novo district court agrants of summary judgment, see Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994), and we affirm.

Tsuji contends that the district court erred by granting summary judgment defendants on his 42 U.S.C. subsection 1983 claims. This contention lacks merit. Under the Eleventh Amendment a state and its agencies are immune from suits brought in federal court whether the relief sought is money damages or an injunction. See Papasan v. Allain, 478 U.S. 265, 276 (1986).

Tsuji contends that the district court erred by granting summary judgment on his claim under the American with Disabilities Act, 42 U.S.C. subsections 12112(a), 12132. This contention lacks merit. Tsuji failed to establish a genuine issue of material fact regarding whether he was a "qualified individual with a disability." See 42 U.S.C.-subsection 12101(2).

Tsuji contends that the district court erred by dismissing his 42 U.S.C. subsection 1985 conspiracy claim. This contention lacks merit. Because Tsuji failed to allege an invidiously discriminatory, racial, or class-based animus, the district court properly dismissed his subsection 1985 claim. See Gerritsen v. De La Madrid Hurtado, 819 F.2d 1511, 1518 (9th Cir. 1987).

AFFIRMED.[1]

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[1] We decline to consider the remainder of Tsuji's contentions because they are raised for the first time on appeal. See Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d-814, 819 (9th Cir. 1992).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STANLEY R. TSUJI,	)	Civil No. 96-01069 SPK
	)	
Plaintiff,	)	
	)	ORDER
v.	)	FILED IN THE UNITED
	)	STATES DISTRICT
STATE OF HAWAII;	)	COURT
DEPARTMENT OF PUBLIC	)	DISTRICT OF HAWAII
SAFETY,	)	OCT 15 1997
	)	AT 2 O'CLOCK, 50
Defendants.	)	MIN. P.M.
	)	WALTER A.Y.H.
	)	CHINN, CLERK

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S COUNTER-MOTION

This action was instituted by Plaintiff, proceeding pro se, Stanley R. Tsuji ("Plaintiff"), against Defendants State of Hawaii and the Department of Public Safety. Plaintiff appears to allege that Defendants discriminated against him by terminating his employment as a prison guard at Hawaii Community Correctional Center because of his disability.

I. BACKGROUND

Plaintiff was employed as a adult corrections officer ("ACO") at the Hawaii Community Correctional Center ("HCCC"), Department of Public Safety in 1984. Def. Exh. A at A-11. While employed with HCCC, Plaintiff complained of irritation from cigarette smoke. Complaint Exh. 2. He sought medical attention from Dr. Kadooka and was advised to not work

in areas with high concentrations of cigarette smoke. Id. Plaintiff was then assigned to work in areas outside of the main building. D Exh. A-13. After HCCC met with the Division of Occupational Safety and Health, Department of Labor and Industrial Relations, regarding condition in the complex regarding improvements. In 1992, HCCC had the air vents redone and the air condition chiller replaced. HCCC also adopted a no smoking policy. Complaint Exh. 1.

After these changes were made in the complex, HCCC warden Beryl Iramina informed Plaintiff that he would be resuming his normal rotation, including post assignments in the Punahele complex. Complaint Exh. 1. Plaintiff placed himself on sick leave and informed his union. Def. Exh. A-20. Plaintiff remained on sick leave from May 1992 until March 1995. On March 3, 1995, Defendant advised Plaintiff that he would be terminated effective March 24, 1995, due to his prolonged absence and pursuant to Title 14, Administrative Rules, Subtitle 1, State of Hawaii Personnel Rules, § 14-14-14(a). Plaintiff was given the opportunity to attend a pre-termination meeting and could bring his union representative if he desired. Plaintiff's discharge took effect on March 24, 1995. Plaintiff filed suit on November 18, 1996.

On August 4, 1997, Defendants filed a Motion for Summary Judgment, arguing that (1) Plaintiff's claims are barred by the statute of limitations and by the Eleventh Amendment; (2) Plaintiff's conspiracy claim under 42 U.S.C. § 1985(3) has no merit; and (3) Plaintiff's claim of discrimination under the ADA has no merit. On September 16, 1997, Plaintiff filed a "concise statement of material facts by Plaintiff in opposition to the Defendant's Motion for Summary Judgment" and an exhibit addendum. On October 1, 1997, Plaintiff filed a counter-motion for summary judgment. On [date], Defendants filed their opposition. Plaintiff uses his counter-motion to expand on his allegations that Defendants conspired against him when terminating him from his employment. Defendants respond that . . .

II. STANDARD OF REVIEW

We must review the pleadings in the light most favorable to Plaintiff, as the nonmoving party. A nonmoving party must show that there are genuine issues of material fact in dispute in order to withstand a motion for summary judgment. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250, (1986). A fact is material when it is relevant to an element of a claim or when its existence might affect the outcome. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court's ultimate inquiry is whether the specific facts set forth by the nonmoving party, together with the undisputed background or contextual facts, could justify a jury verdict in its favor. Id. at 631. It is well-settled that the opposing party in a motion for summary judgment may not defeat the motion in the absence of any significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). Plaintiff is proceeding pro se, and this court is required to liberally construe his pleadings and documents. McGuckin v. Smith, 974 F.2d 1050, 1055 (9th Cir. 1992).

III. DISCUSSION

A. Statute of Limitation

Plaintiff filed this action on November 18, 1996. Therefore, any alleged events or actions that occurred prior to November 18, 1994, are barred by the statute of limitation. The statute of limitation period for § 1983 actions is "a State's personal injury statute of limitation[ ]." Owens v. Okure, 488 U.S. 235, 420-41, 109 S.Ct. 573, 577 (1989) The statute of limitation applicable to 42 U.S.C. § 1983 actions in Hawaii is Haw. Rev. Stat. § 657-7, the two year, "general personal injury" provision. Pele Defense Fund v. William Paty, 837 P.2d 1247 (1992), cert. denied, 113 S.Ct. 1277 (1993). See also, Caywood v. Summers, Civ. No. 91-00103 ACK; Price v. State of Hawaii, 939 F.2d 702 (9th Cir. 1991) (dictum), cert. denied, 112 S.Ct. 1479 (1992).

Hawaii Revised Statute § 657-13 does toll the statute of limitation for those who are incarcerated, but it does not toll suits against the sheriff or police. Haw. Rev. State. § 657-13 (1985). Plaintiff's suit is against the Department of Public Safety. The statute creating the department of public safety specifically states that the "functions, authority, and obligations, . . . and the privileges and immunities conferred thereby, exercised by a 'sheriff' . . . shall be exercised to the same extent by the department of public safety." Haw. Rev. Stat. § 26-14.6(f). Therefore, § 1983 claims against the Department of Public Safety and/or its officials are not tolled by Haw. Rev. Stat. § 657-13. Thus, Plaintiff's claims are not tolled and all claims based on events which occurred prior to November 18, 1994, are barred.

Some of the events which Plaintiff argues constituted discrimination based on his "disability" occurred after November 18, 1994, including termination from his job. The court finds that the statute of limitations does not bar this suit.

B. Sovereign Immunity

To the extent that Plaintiff seeks to bring an action for damages against the State of Hawaii or its officials acting in their official capacity, this court finds that the action is barred by the Eleventh Amendment to the United States Constitution.

Under the Eleventh Amendment, a state is immune from suit brought in federal court by her own citizens or citizens of other states. Papasan v. Allain, 106 S.Ct. 2932, 2939 (1986); Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900, 908 (1984). Federal court actions against agencies or instrumentalities of a state are also barred by the Eleventh Amendment. Shaw v. State of Cal. Dept. of Alcoholic Beverage Control, 788 F.2d 600, 603 (9th Cir. 1986). A suit against state officials, in their official capacities, is no different than a suit against the state itself and therefore is subject to the Eleventh Amendment. Kentucky v. Graham, 105 S.Ct. 3099, 3105-06 (1985). Moreover, "neither a state nor its officials acting in their official capacity are 'persons' under § 1983." Will v. Michigan Dept. of State Police, 109 S.Ct. 2304, 2308-12 (1989).

Thus, unless the state unequivocally waives sovereign immunity or Congress exercises its power under the Fourteenth Amendment to override the immunity, the state, its agencies, and its officials - acting in their official capacity - are immune from suit under the Eleventh Amendment. Will, 109 S.Ct. at 2309-10; Pennhurst, 104 S.Ct. at 908.

Because the State of Hawaii has not waived its Eleventh Amendment immunity, and Plaintiff has not asserted a cause of action based on any federal law which overrides that immunity, this suit is barred to the extent that Plaintiff's complaint states a cause of action against Defendants in their official capacities for damages.

The Eleventh Amendment, however, does not bar suits against state officials sued in their individual capacities. Blaylock v. Schwinden, 862 F.2d 1352, 1354 (9th Cir. 1988). Nor is the Eleventh Amendment a bar to "actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities." Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992); Will, 109 S. Ct. 2311 n. 10 (noting the availability of prospective injunctive suits against the state).

In order to have standing to obtain prospective injunctive relief, a plaintiff must show some substantial likelihood that the past challenged official conduct will recur in the future. Nelson v. King County, 895 F.2d 1248, 1250 (1990); City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983) (reasonable showing of a sufficient likelihood that plaintiff will be injured again). Plaintiff must demonstrate a "credible threat" that he will be subject to a specific injury for which he seeks injunctive relief. Sample v. Johnson, 771 F.2d 1335, 1340 (9th Cir. 1985), cert. denied, 475 U.S. 1019 (1986). "The 'mere physical or theoretical possibility' of a challenged action again affecting plaintiff is not sufficient." Id. (citing Murphy v. Hunt, 455 U.S. 478, 482 (1982)).

Plaintiff's complaint does not seek prospective injunctive relief. Nor is it apparent, upon the facts alleged in the Complaint, that Plaintiff could properly request such relief. Additionally, Plaintiff fails to name an individual against whom injunctive relief

could be sought. Accordingly, this court recommends dismissing the State of Hawaii on the basis of Eleventh Amendment Immunity.

C. Disability

The final issue is whether Plaintiff is in fact disabled, under the definition of the American with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., entitling him to bring this action. Plaintiff claims that he suffers from respiratory problems due to cigarette smoke inhalation at HCCC. The court finds that he is not disabled under the definitions provided by the statute.

Under the statute, the ADA prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual." 42 U.S.C. § 12112. Discrimination is defined under the ADA as "limiting, segregating, or classifying a job applicant in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such . . . employee" and includes "utilizing standards, criteria, or methods of administration - (A) that have the effect of discrimination on the basis of disability . . ." Disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102 (2) (A). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

In order to prevail on a claim of unlawful discharge under the ADA, the "plaintiff must establish: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability." Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996). In order to state a prima facie case under the ADA, Plaintiff must prove that he is a qualified individual with a disability who has been discharged because of the disability. Sanders v. Arneson Products, Inc., 91 F.3d 1351, 1353 (9th Cir. 1996), cert. denied - U.S. -, 117 S.Ct. 1247 (1997).

The court first finds that a genuine dispute of material fact does not exist with regard to whether Plaintiff was actually disabled within the meaning of the ADA. The court finds that Plaintiff's impairment did not limit any of his major life activities. Plaintiff did not present any evidence that he was substantially limited from the major life activity he alleged, working. See 29 C.F.R. § 1630.2(i). For an impairment to substantially limit one's ability to work, it must not merely prevent one from working at a particular job; it must prevent one from working at a class of jobs or a broad range of jobs in various classes. 29 C.F.R. § 1630.2(j)(3). Defendants stated that, since 1992 when Plaintiff left HCCC for sick leave, he has worked part-time as a shuttle driver for Express Employment, as a taxi driver for Aloha State Company, and as a substitute teacher for the public schools. Def. Exh. A. Plaintiff has not contested that he had these jobs. The court therefore finds that Plaintiff was not disabled under the definition of the ADA and is not entitled to bring these claims.

D. Conspiracy

Finally, Plaintiff also claims a violation of 42 U.S.C. § 1985. To state a cause of action under § 1985(3), Plaintiff must show 1) a conspiracy, 2) to deprive any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws, 3) an act by one of the conspirators in furtherance of the conspiracy, and 4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States. Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980).

Because § 1985 derives from the Thirteenth Amendment, a plaintiff must also allege "invidiously discriminatory, racial or class-based animus." Caldeira v. County of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989); Gillespie, 629 F.2d at 641. Furthermore, if the alleged conspiracy is between the government and a private party, then a plaintiff must show that there was an agreement or a "meeting of the minds" to deprive the plaintiff of his or her constitutional rights. Caldeira, 866 F.2d at 1181. Moreover, if predicated on the same allegations, the absence of a deprivation of rights for a § 1983 claim precludes a § 1985 conspiracy claim. Id. at 1182.

As discussed above, Plaintiff's complaint fails to establish a 42 U.S.C. § 1983 claim, thus he has not established a deprivation of rights thereunder. Consequently, he cannot sustain a § 1985 conspiracy claim. Id. In addition, Plaintiff's complaint does not allege any invidiously discriminatory, racial or class-based animus. Accordingly, Plaintiff's Complaint does not state a § 1985 (3) claim against Defendants. Gerritsen v. De La Madrid Hurtado, 819 F.2d 1511, 1519 (9th Cir. 1987).

Accordingly, this court dismisses Plaintiff's Complaint, insofar as it alleges a violation founded upon 42 U.S.C. § 1985.

IV. CONCLUSION

Based on the above, the court grants Defendant's Motion for Summary Judgment and DENIES Plaintiff's counter-Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii October 15, 1997.

/s/ Samuel P. King
UNITED STATES DISTRICT JUDGE

TABLE OF AUTHORITIES
APPENDIX C

CASES **PAGE NUMBER**

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77 Haw. 100, 881 P.2d 1246 (1994)

Royal State National Ins. v Labor Bd., ... 5
53 Haw. 32, 487 P.2d 278 (1971)

NO. 19284

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STANLEY R. TSUJI,	)	CASE NO.
	)	AB 93-443(H)
Claimant-Appellant,	)	(1-92-10190) (HON)
	)	
vs.	)	APPEAL FROM THE
	)	DECISION AND
STATE OF HAWAI'I;	)	ORDER DATED
DEPARTMENT OF PUBLIC	)	AUGUST 11, 1995.
SAFETY,	)	
	)	
Employer-Appellee,	)	LABOR AND
Self-Insured.	)	INDUSTRIAL
	)	RELATIONS APPEALS
	)	BOARD,
	)	STATE OF HAWAI'I
	)	
	)	

MEMORANDUM OPINION

Claimant-Appellant Stanley R. Tsuji (Claimant) appeals from the decision and order of the Labor and Industrial Relations Appeals Board (Board), which concluded that Claimant did not suffer a personal injury on May 25, 1992, arising out of and in the course of his employment.[2] We affirm the Board's decision.

I. BACKGROUND

In September 1986, Claimant began his employment as an adult corrections officer with the Hawai'i Community Correctional Center (HCCC). In May 1989, Claimant sought and received treatment from Craig Kadooka, M.D., for chronic symptoms of nasal congestion, sore throat, dry and burning eyes, and loss of smell for three to four months. On June 5, 1989, Dr.

Kadooka diagnosed Claimant as exhibiting allergic rhinitis and moderate small obstructive lung disease, which appeared to be consistent with exposure to irritative substances such as cigarette smoke. [2] Dr. Kadooka recommended that Claimant be indefinitely restricted from working in smoke laden areas until the smoking policy was changed or much improved air circulation was achieved.

Claimant was subsequently placed on modified duty status at HCCC and assigned to work in open-air buildings and other outdoor posts. Claimant remained on modified duty for three years.

On or about May 21, 1992, HCCC administrator, Beryl Iramina (administrator Iramina), notified Claimant that due to the replacement of the air conditioning chiller, redoing of the air vents, and institution of a "no smoking" policy in the prison complex, the air problems were rectified. Iramina then ordered Claimant back to full duty status. Claimant refused administrator Iramina's order and continued to work on modified duty status through May 22, 1992. Beginning on May 23, 1992, Claimant took sick leave and never returned to HCCC.

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[1] Claimant also raises claims for violation of the State Whistleblowers' Protection Act and Occupational Safety and Health laws, under Hawai'i Revised Statutes (HRS) Subsection 378-63 and 396-8, respectively. However, relief for violations of HRS subsection 378-63 must be brought in the circuit court where the alleged violation occurred. Similarly, employees who believe that they have been subjected to retaliatory discrimination in response to a filing of a complaint for Occupational Safety and Health violations may file a separate complaint with the Director of Labor and Industrial Relations under the authority of HRS subsection 396-8. Therefore, Claimant's HRS subsection 378-63 and 396-8 claims, as framed, are clearly outside the scope of this court's appellate jurisdiction in the instant case.

On May 26, 1992, Claimant sought treatment with Edward Lau, M.D. a general and vascular surgeon, and on May 27, 1992, he saw Leigh Sakamaki, M.D., a psychiatrist. Subsequent to consultation with these physicians, Claimant filed a worker's compensation claim for mental anguish from "(p)rolonged harassment and threats by supervisors and co-workers for almost three years ever since being on modified duties since 6-5-89. On 5-25-92(,) (sic) I was given a written order to resume my duty in the environment that already had damaged my lungs placing me on modified duties in the first place."

On June 18, 1993, the Disability Compensation Division, Department of Labor and Industrial Relations (Director), determined that Claimant suffered a stress injury, on May 25, 1992, which arose out of and in the course of Claimant's employment at HCCC. HCCC appealed the Director's decision to the Board. on August 11, 1995 the Board reversed the Director's decision. Upon receiving an unfavorable decision by the Board, Claimant filed a motion for reconsideration to the Board, which was denied. Claimant then filed the instant appeal.

II. STANDARD OF REVIEW

> (A)ppeals taken from findings set forth in decisions of the Board are reviewed under the clearly erroneous standard. Thus, this court considers whether such finding(s are) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The clearly erroneous standard requires this court to sustain the Board's findings unless the court is left with a firm and definite conviction that a mistake has been made.

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[2] On November 13, 1987, Claimant filed a separate claim for worker's compensation benefits for his respiratory condition. He was determined to be 5% impaired and awarded disability benefits.

> A conclusion of law () is not binding on an appellate court and is freely reviewable for its correctness. Thus, this court reviews (conclusion of law) de novo, under the right/wrong standard.

Diaz v. Oahu Sugar, Co., 77 Hawai'i 152, 155, 883 P.2d 73, 75-76 (1994) (quoting Tate v. GTE Hawaiian Tel. Co., 77 Hawai'i 100, 102-103, 881 P.2d 1246, 1248-49 (1994) (internal citations, internal quotation marks, and footnotes omitted)) (brackets in original).

III. DISCUSSION

Claimant contends that the Board erred when it determined that he did not suffer a compensable work injury on May 25, 1992, which arose out of and in the course of his employment under HRS subsection 386-3.[3]

Our review of the record establishes that there was ample evidence to support the Board's decision and order. Under HRS subsection 386-85(1),[4] it is presumed, in the absence of substantial evidence to the contrary, that a workers' compensation claim is for a covered work injury.[5] However, as recognized by the Board, Claimant failed to show that he suffered an injury. Claimant's failure to adduce such evidence is fully supported by the record.

Claimant alleges that he suffered "mental anguish" on May 25, 1992, four days after he received the order from administrator Iramina to return to full duty status.

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[3] HRS subsection 386-3 (1993) states in pertinent part:

> Injuries covered. If an employee suffers by accident arising out and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as herein provided.

The Board reviewed the Lau and Sakamaki medical records and determined that, based on the lack of documented psychiatric symptoms or treatment in the records, Claimant did not establish that he suffered any type of psychiatric injury. Specifically the Board noted that while Dr. Lau's clinical notes documented Claimant's desire to take a leave of absence from work, as well as his expressed refusal to work in the air-conditioned building, such notes were devoid of any psychiatric symptoms.

A review of Dr. Sakamaki's clinical records reveal a similar picture. Again, Claimant related his refusal to return to work in the air-conditioned building. However, while Dr. Sakamaki diagnosed Claimant as suffering from "acute situational stress," the clinical notes are devoid of specific and documented psychiatric symptoms and treatment plans.[6]

---

[4] HRS subsection 386-85(1) (1993), states in pertinent part:

Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary:

(1) That the claim is for a covered work injury;

[5] See Royal State National Ins. v. Labor Bd., 53 Haw 32, 34-35, 487 P.2d 278, 280 (1971)

Based on the above, the record is clear that Claimant failed to establish that he sustained a psychiatric injury. The Board fully considered the lack of documentation of any psychiatric symptomology or treatment in Claimant's medical records. Accordingly, we hold that the Board did not err when it determined that Claimant did not suffer a compensable work injury which arose out of and in the course of his employment.

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[6] On December 21, 1993, Claimant was given an independent medical evaluation (IME) by Byron Eliashof, M.D., a psychiatrist, regarding his alleged May 25, 1992 injury. After examining Claimant, Dr. Eliashof opined:

> Mr. Tsuji did not develop a psychiatric disorder as a result of having been ordered to work in the closed air facility. Rather, it was a matter of personal preference and his difficulty relating to personnel there. He has been able to continue pursuing his studies toward (a) Master's degree in Business Administration and has been able to work 20 hours a week driving a taxi.

Furthermore, on February 20, 1994, Dr. Eliashof reviewed Claimant's medical reports prepared by Dr. Sakamaki and reaffirmed his opinion that Claimant did not display any symptoms of psychiatric disorder.

IV. CONCLUSION

Therefore, we affirm the decision and order of the Board.

DATED: Honolulu, Hawai'i, July 25, 1996.

On the briefs:

Stanley R. Tsuji,
Claimant-appellant pro se

Ruth I. Tsujimura and
Janice T. Kemp, Deputy Attorneys General,
for employer-appellee,
self-insured

/s/ Ronald Moon

/s/ Robert Klein

/s/ Stewart Levinson

/s/ Paula A. Nakayama

/s/ Mario R. Ramil

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

STANLEY R. TSUJI,	)	CASE NO.
	)	AB 93-443(H)
Claimant-Appellee,	)	(1-92-10190)
	)	
vs.	)	
	)	
STATE OF HAWAII	)	95 AUG 11 A 10:29
DEPARTMENT OF PUBLIC	)	
SAFETY,	)	
	)	FILED
Employer-Appellant,	)	LIRAB
Self-Insured.	)	(AB 93-443 [H])
	)	STATE OF HAWAII

DECISION AND ORDER

This workers' compensation case is before the Board on appeal by Employer, STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY, from the decision of the Director of Labor and Industrial Relations (Director) dated June 18, 1993. In that decision, the Director found that Claimant sustained a compensable psychiatric injury on May 25, 1992. Claimant was awarded medical care and temporary total disability benefits.

The sole issue on appeal is whether Claimant suffered a personal injury on May 25, 1992, arising out of and in the course of employment.

The file was stipulated into evidence by the parties.

For the reasons which follow, we reverse the decision of the Director:

FINDINGS OF FACT

1. Claimant began working as a corrections officer for Employer in September 1986, at the Hilo Community Correctional Center in an air-conditioned building.

2. In May 1989, Craig Kadooka, M.D., an internist, treated Claimant for symptoms of raw sinuses, runny nose, and sensitive eyes. Dr. Kadooka noted that the symptoms were consistent with inhalation of cigarette smoke and poor ventilation. Dr. Kadooka diagnosed Claimant with allergic rhinitis and small airway lung disease, and recommended that Claimant be excused from working in the air-conditioned building.

3. Claimant was subsequently placed on modified duty and assigned to work in an open building with free-flowing fresh air. He remained on modified duty for three years.

4. On or about May 21, 1992, Employer notified Claimant that the air problem in the building in which he previously worked has been rectified and directed him to return.

5. Claimant refused to comply with Employer's order.

6. On May 25, 1992, Claimant consulted Leigh Sakamaki, M.D., a psychiatrist. According to Dr. Sakamaki, Claimant was suffering from an "acute situational stress" relating to Employer's order to return to work in a building which he considered unsafe, and alleged harassment by co-workers. Dr. Sakamaki's records fail to document any actual psychiatric symptoms.

7. On May 26, 1992, Claimant saw Dr. Edward Lau, a specialist in general and vascular surgery. According to Dr. Lau's notes, Claimant expressed both a refusal to work in Employer's air-conditioned building and a desire to take a leave of absence from work. Dr. Lau's records did not document any psychiatric symptoms.

8. Claimant was evaluated by psychiatrist, Dr. Byron Eliashof, on December 21, 1993. In his report dated February ____1994, Dr. Eliashof opined that Claimant did not suffer any psychiatric condition on May 25, 1992, as a result of alleged work stress, since there is no medical documentation of actual psychiatric symptoms and treatment. According to Dr. Eliashof, an "acute situational stress" is neither a psychiatric illness nor a symptom of one. We credit Dr. Eliashof's opinion.

9. On or about June 8, 1992, Claimant sought employment with Express Employment, an employment agency. On June 23, 1992, Claimant was hired as a shuttle driver. He subsequently found work as a part-time taxi driver and substitute teacher. In August 1992, Claimant enrolled at Kapiolani Community College.

10. Claimant has failed to establish that he sustained a psychiatric injury on May 25, 1992.

CONCLUSIONS OF LAW

We conclude that Claimant did not suffer a personal injury on May 25, 1992, arising out of and in the course of employment.

We base our conclusion on the lack of medical evidence to support a finding of a psychiatric injury. As noted above, none of Dr. Lau's and Dr. Sakamaki's records document any actual psychiatric symptoms or treatment on or after May 25, 1992. We also base our conclusion on the opinion of Dr. Eliashof that "acute situational stress" is neither a psychiatric illness nor a symptom of one, and that Claimant did not suffer from any diagnosable psychiatric condition on May 25, 1992, as a result of job stress.

Although claims for compensation under Chapter 386 of the Hawaii Revised Statutes (H.R.S.) are entitled to a presumption of compensability under H.R.S. §386-85, we have stated that a claimant may not avail himself to the statutory presumption unless the injury or evidence of such has first been established. Diana Fairechild v. United Airlines, Inc., AB 90-182 (1994); see also, 2C Larson, The Law on Workmen's Compensation, Section 80.33(a) (1993) (statutory presumption does not apply until claimant first establishes the facts required to invoke the presumption). In this case, Claimant has failed to establish that he sustained a psychiatric injury on May 25, 1992. The statutory presumption is, therefore, not invoked.

ORDER

The decision of the Director dated June 18, 1993, is hereby reversed.

DATED: Honolulu, Hawaii, Aug. 11, 1995.

/s/ Frank Yap, Jr.,
Chairman

/s/ Carol K. Yamamoto,
Member

/s/ Charles T. Akama,
Member

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
830 PUNCHBOWL ST RM 209
HONOLULU HI 96813

Claimant	STANLEY R. TSUJI PO BOX 778 HONOLULU HI 96808	DECISION 93 JUN 18 A 7:52
Employer	STATE OF HAWAII DEPT OF PUBLIC SAFETY	
Insurance Carrier	STATE OF HAWAII DEPT OF PERSONNEL SERVICES WORKERS COMPENSATION DIVISION 345 QUEEN ST 5TH FL HONOLULU HI 96813	

Case No: 19210190
D/A: MAY 25, 1992
SSN: 576-92-0977

Such investigation of the above-entitled matter having been made as the Director deems necessary, the Director makes the following.

FINDING OF FACTS

On May 25, 1992, claimant was in the employ of the above-named employer; on said date, claimant sustained stress injured by accident arising out of and in the course of employment; said injury was not caused by claimant's willful intention to injure oneself or another nor by intoxication. As a result of said injury, claimant was temporarily and totally disabled from work beginning (waiting period: May 25, 1992 through May

27, 1992) May 28, 1992 and continuing until such time as the Director deems such disability has ended. The matters of permanent partial disability and disfigurement, if any, shall be determined at a later date. The average weekly wages of the claimant were $474.69.

A hearing was held to discuss the issues of compensability, temporary total disability, and other related issues.

Claimant contends that the stress and mental anguish he suffers is a result of three years of harassment and threats from being on modified duty in the outdoors because of his work related respiratory ailment. He states that his stress worsened on May 25, 1992 when he was wrongfully ordered by his employer to report to regular duty at the closed air facility which had caused his respiratory ailments. He further contends that employer did not have State of Hawaii, Dept. of Occupational Safety & Health (DOSH) do a follow-up scientific investigation of the closed air facility since it was renovated and the no smoking policy was implemented.

Claimant notes that Edward Lau, M.D.'s certificate of May 26, 1992 advises him to go on leave of absence based on stress if he is returned to work inside the building.

Employer denies liability for this alleged claim because no documented injury or accident occurred which would fall under workers' compensation laws. Employer contends that claimant's argument that his alleged stress is from being returned to the closed air facility is not valid because this facility had recently been renovated and there is now a total smoking ban policy in accordance with Craig Kadooka, M.D's recommendation in his letter June 5, 1989 if claimant was to return to this facility. Further, the June 1, 1989 DOSH report indicated that there was no violations and prior to employer's order to return to the facility, DOSH inspected the facility and indicated that the air appeared to be clean.

Claimant's previous workers' compensation claim of November 13, 1987 was for a respiratory condition. A Physician's report (WC-2) of July 18, 1989 indicated that no further treatment was necessary after June 5, 1989. Subsequently, a March 9, 1990 decision was rendered and stress was not noted in this decision.

Upon review of the entire matter, we find this claim for workers' compensation is compensable. Although claimant apparently felt stress from harassment and threats since he was placed on modified duty on June 5, 1989, it appears that claimant's stress did not manifest until May 25, 1992 when claimant was ordered by employer to return to regular duty at the closed air facility which caused his respiratory ailments. Claimant sought treatment with Dr. Lau on May 26, 1992 and Leigh Sakamaki, M.D., on May 27, 1992. Both doctors opine that claimant should not return to the closed air facility. Dr. Sakamaki opines in her WC-2 of May 27, 1992 that claimant suffers from "acute situational stress to work situation." Dr. Sakamaki also opines that further psychiatric treatment is not necessary if he is not put back into the closed air environment.

Employer states that Dr. Kadooka opined in his WC-2 report of July 18, 1989 that no further treatment was necessary after June 5, 1989. We note that Dr. Kadooka in his letter of June 5, 1989, recommends that claimant's restriction from "working in smoke-laden areas be indefinite until the smoking policy is changed or much-improved air circulation is achieved." Employer assets that these changes have been made since there is currently a smoking ban inside this facility and the air condition system was renovated. We acknowledge that employer has made the recommended changes but question whether a satisfactory follow-up investigation was conducted by DOSH.

A letter dated April 19, 1992 from the employer's administrator to DPS indicates that a DOSH investigator inspected all buildings at HCCC on March 29, 1992 and "verbally indicated the air appeared clean. He indicated that he would follow-up with the ventilation installers regarding scope of work. To this date, the written report has not been received." Based on the above letter, we do not believe that a satisfactory investigation was conducted

whereby employer would be able to order claimant back to the closed air facility.

Further, Dr. Lau's WC-2 report dated August 14, 1992 indicated that when he consulted claimant on July 18, 1992, "patient feels less stress and less breathing problems since leaving site of work." In his subsequent WC-2 dated December 23, 1992, Dr. Lau indicates that when he consulted claimant on December 17, 1992, claimant suffered "no specific problems-stress and anxiety resolving." During these two consultations, Dr. Lau indicates that claimant was not working. Based on this, claimant's problem appears to be resolving when he is away from the closed air facility at work.

Therefore, based on the aforementioned, we find that claimant is entitled to temporary total disability benefits from May 25, 1992. Employer has not provided any medical evidence that the environment which they have ordered claimant to return to is "safe" for him, thereby resolving his situational stress.

Thereupon the Director makes the following

DECISION

1. Pursuant to Sections 386-21 and 386-26, HRS, said employer shall pay for such medical care, services and supplies as the nature of the injury may require.

2. Pursuant to Section 386-31(b), HRS, said employer shall pay to claimant weekly compensation of $316.48 for temporary total disability beginning May 28, 1992 and terminating at such time as is determined by the Director that such disability has ended.

3. The matters of temporary disability, permanent disability and/or disfigurement, if any, shall be determined at a later date.

BY ORDER OF THE DIRECTOR, JUNE 18, 1993.

/s/ Gary Hamada,
Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or his county representative within twenty days after a copy of this decision has been sent.

TABLE OF AUTHORITIES
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54 Haw. 98, 503 P.2d 434 (1972)

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
830 PUNCHBOWL ST RM 209
HONOLULU HI 96813

Claimant	STANLEY R. TSUJI 121 BANYAN DRIVE, APT. 514 HILO, HI 96720	DECISION 90 MAR 9 A 8:37
Employer	STATE OF HAWAII DEPT OF CORRECTIONS PERSONNEL OFFICE SAFETY UNIT GOLD BOND BUILDING 677 ALA MOANA BLVD., SUITE 700 HONOLULU, HI 96813	
Insurer	STATE OF HAWAII DEPARTMENT OF PERSONNEL SERVICES STATE WORKERS' COMPENSATION DIVISION 345 QUEEN STREET, 5TH FLOOR HONOLULU, HI 96813	

Case No: 18910156
D/A: NOVEMBER 13, 1987
SSN: 576-92-0977

Such investigation of the above-entitled matter having been made as he deems necessary, the Director makes the following.

FINDING OF FACTS

On November 13, 1987, claimant was in the employ of the above-named employer; on said date, claimant sustained a personal injury to his respiratory system by accident arising out of and in the course of his employment; said injury was not caused by claimant's willful intention to injure himself or another nor by his intoxication. No temporary total disability resulted from this injury. Permanent partial disability and disfigurement, if any, shall be determined at a later date. The average weekly wages of the claimant were $466.09.

A review of the records indicates claimant filed an Employee's Claim for Workers' Compensation Benefits (WC-5) dated July 11, 1989 in response to an Employer's Report of Industrial Injury (WC-1) dated June 13, 1989, which denied liability for this injury. A hearing on the above-captioned matter was conducted on January 19, 1990.

Claimant states he first began working at the jail in December of 1984. He noticed the smell of cigarette smoke, which is the same now as it was then. Within approximately two months, claimant began experiencing symptoms such as runny nose, burning eyes, etc. These symptoms, however, did not cause any lost time from work. From August 1985 to September 1986, claimant received training and worked on Oahu and on Maui. While on Maui, which had the same type of closed air conditioning as Hilo, claimant did not experience any difficulties. In September 1986, claimant returned to Hilo where he continues employment at the jail to the present. Claimant was not aware he sustained any lung damage until May of 1989 when he sought medical care for his symptoms from Craig Kadooka, M.D. The doctor diagnosed allergic rhinitis, possibly related to cigarette smoke exposure, and ordered a pulmonary function test (PFT) which revealed evidence of obstructive airway disease. Claimant states his pre-employment physical in 1984 did not reveal any evidence of a chronic condition, such as bronchitis, and his PFT was normal. At present, Dr. Kadooka reports his PFT is abnormal. Claimant was not aware he had sustained any lung damage until May 1989 and opines the injury must have occurred between 1984

and this date. On November 13, 1987 and again on June 5, 1989, claimant informed employer of his concern and his belief the ventilation system and the cigarette smoke were causing his symptoms. Claimant suggested certain modifications to the facility to improve the situation.

Employer states the claim is barred by the Statutes of Limitation since claimant did not file claim within two years of the manifestation of symptoms, which occurred in 1985, as claimant testified. Alternatively, employer states claimant's symptoms are merely a temporary aggravation of his long-standing , preexisting condition. The medical records of Edward Lau, M.D. reveal claimant's history of upper respiratory infection (URI's), pharangitis, and rhinitis dating back to October 1966. Dr. Kadooka, Dr. Lau, and Roy Adaniya, M.D., diagnose claimant's present condition as allergic rhinitis and bronchitis, symptoms claimant has experienced even prior to his employment.

First, in addressing employer's Statute objection, we note there is no dispute claimant began experiencing symptoms approximately two months after starting work in December 1984. Also undisputed is the fact claimant notified employer on November 13, 1987, by letter dated November 8, 1987, of his belief the ventilation system and cigarette smoke were causing his symptoms. In the case of Demond vs. University of Hawaii, 54 Haw. 98 (1972), the court approved the general rule on excuses for late notice or claim established by Profession Larson which states:

> The time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease.
>
> 3 Larson, Workmen's Compensation Law, Section 78.41 (1970)

As claimant testified, he worked on Oahu and on Maui between August 1985 and September 1986. Claimant experienced no difficulties while away from Hilo but, after his return, he again

began to experience respiratory problems. The claim for compensation was later filed, on July 11, 1989, within two years of claimant's notification to employer on November 13, 1987 of his belief his symptoms were caused by work. Thus, the claim for compensation was filed within two years of claimant's recognition of the probable compensable nature of his injury. The five-year limitation is not an issue. Accordingly, we find the claim is not barred by the Statutes of Limitations. Reviewing the medical evidence on file, we note the agreement of the physicians not only as to the diagnosis of claimant's condition, but also to the probable etiology. Among the records on file is a June 1, 1989 investigation report to employer from the Safety and Health Branch of the Department of Labor, Division of Occupational Health and Safety (DOSH).This report confirmed carbon dioxide levels in the jail's multi-purpose room were higher than recommended by the American Society of Heating, Refrigeration, and Air-Conditioning Engineers, Inc. (ASHRAE). Although not a violation of Hawaii's standards, it was noted this condition could cause "more complaints alleging headaches, fatigue, and eye and throat (mucous membrane) irritation, not so much due to the carbon dioxide itself but due to the presence of other contaminants associated with inadequate amounts of fresh air." Carbon monoxide levels were zero, indicating cigarette smoking was not a problem. The kitchen and hallway air supply ducts showed condensate (water droplets) and had fungi (mold and mildew) growing on them. DOSH noted spores from fungi had been shown to cause allergies similar to respiratory infection in sensitive individuals. Certain changes and modifications were recommended to alleviate the problem. From all of the foregoing, it is clear the air conditioning/ventilation system, if not cigarette smoking, could have caused the symptoms of which claimant complained and which his physicians diagnosed. Additionally, there is no medical evidence to the contrary. Accordingly, we find the claim compensable. Whether claimant's condition is temporary or permanent, however, is unknown and any determination in that regard is deferred.

Thereupon the Director makes the following

DECISION

1. Pursuant to Sections 386-21 and 386-26, HRS, said employer shall pay for such medical care, services and supplies as the nature of the injury may require.

2. No temporary disability resulted from this accident.

3. The matters of permanent disability and disfigurement, if any, shall be determined at a later date.

BY ORDER OF THE DIRECTOR, MARCH 9, 1990.

/s/ Clyde Imada,
for Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or his county representative within twenty days after a copy of this decision has been sent.